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No. 85-1152

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

BANDAI AMERICA INCORPORATED,
a New Jersey corporation, *et al.*,
Petitioners,

vs.

BALLY MIDWAY MFG. CO.,
an Illinois corporation, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID A. GERBER*
ROBERT A. MEYER
JAMES B. HICKS
LOEB & LOEB
Suite 1600
One Wilshire Building
Wilshire Boulevard
at Grand Avenue
Los Angeles, CA 90017
(213) 629-0200

KEITH F. BODE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

FREDERICK L. WHITMER
GREGORY C. PARLIMAN
PITNEY, HARDIN,
KIPP & SZUCH
163 Madison Avenue
Morristown, New Jersey 07960
(201) 267-3333

***Counsel of Record**

Attorneys for Respondent
BALLY MIDWAY MFG. CO.

Lawyer's Brief Service, Inc. / Legal Publishers / (213) 383-4457

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rules 22.1 and 34.2, Midway is dissatisfied with Bandai's argumentative Questions Presented, and therefore amends such Questions Presented as follows:

1. Did the Court of Appeals properly affirm the District Court's conclusion that Midway did not defraud the court in a long-concluded prior lawsuit, when (a) Bandai as a factual matter was found to be responsible for its failure to adduce evidence supposedly withheld by Midway; (b) the allegedly withheld evidence could not have made any difference whatsoever in the court's deliberations; and (c) Midway's only alleged delinquency was a supposed failure to produce two documents (in contrast, for example, to acts of bribery or forgery).

2. Given conceded necessity of showing fraud for an antitrust claim such as Bandai's, did the Court of Appeals properly affirm the District Court's dismissal of the antitrust claims in the absence of any fraud on the court?

RULE 28.1 STATEMENT

Pursuant to Supreme Court Rule 28.1, Midway hereby adopts Bandai's listing of Midway's parent and affiliated corporations at page ii of the Petition.

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STATUTES AND RULE INVOLVED

Pursuant to Supreme Court Rules 22.1 and 34.2, Midway believes that Petitioners' "Statute Involved" raises a false issue, and therefore amends such section as follows:

17 U.S.C. § 101:

> "A 'transfer of copyright ownership' is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license."

17 U.S.C. § 501(b):

> "The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of Sections 205(d) and 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require such owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any person having or claiming an interest in the copyright."

Fed.R.Civ.P. 56(c):

> "The motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The

> judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT OF THE CASE

This litigation has its genesis in a prior action ("Bandai I") against Bandai for copyright and trademark infringement initiated by Midway and a party absent here, Coleco. Judge Meanor, who presided in Bandai I, held that Bandai pirated Midway's PAC-MAN and GALAXIAN video games and granted Midway a partial summary judgment and preliminary injunction. Shortly thereafter, the parties entered into a settlement agreement by which Bandai broadly "released all possible claims" against Midway. Petition Appendix at 5. Bandai does not question the court's fundamental finding of wholesale infringement.

Despite its broad release, long after the Bandai I judgment Bandai initiated the lawsuit below ("Bandai II"), seeking to set aside the Bandai I judgment and settlement. Although Bandai II asserts Sherman Act claims, RICO violations, and a potpourri of other counts, Bandai's principal contention is that Midway defrauded the Court in Bandai I. Midway supposedly failed to produce two documents showing an alleged "secret agreement" that Midway's PAC-MAN and GALAXIAN copyrights would revert back on demand to the transferor, Namco. Although

Bandai has never asserted that the two copyrights were actually returned, it contends that the alleged "secret agreement" in itself divested Midway of standing to sue for copyright infringement, and that had Judge Meanor known about it, he supposedly would have ruled in Bandai's favor in Bandai I.[1]

In Bandai II Midway moved to bifurcate Bandai's fraud allegations. Bandai conceded that unless it could establish fraud its Sherman Act and other claims could not be sustained. Petition Appendix at 6. The District Court issued the requested bifurcation order.

Midway then brought a summary judgment motion on the bifurcated claims, assuming *arguendo* the truth of Bandai's assertions as to the "secret agreement." The District Court granted the motion, holding as a matter of fact that Bandai had every opportunity to engage in discovery regarding the supposedly nondisclosed matters in Bandai I, and that its failure to do so was attributable to its own negligence rather than to any "fraud" by Midway. The District Court further found that in any event the "secret agreement" could not have defeated Midway's standing to sue in Bandai I. The District Court finally found that under established law Midway's supposed nondisclosure of two irrelevant documents was insufficient to constitute fraud on the court. The District Court therefore concluded that there were no conceivable grounds for vacating the Bandai I judgment, and that Midway was entitled to summary

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[1] As a factual matter, Midway vigorously denies any such "secret agreement" or any other improper conduct. Bandai's allegations, though disturbing to any counsel, are simply baseless. Midway conceded the truth of Bandai's factual allegations below solely for purposes of its summary judgment motion.

judgment. The Court of Appeals unanimously affirmed the District Court in every one of these matters.

Both lower courts, after reviewing Bandai's voluminous arguments and "evidence," and in careful opinions occupying 45 pages in the Petition Appendix, rejected Bandai's fraud theories as "simply wrong" and "nonsensical." Petition Appendix at 8, 21 n.l.

THE PETITION SHOULD BE DENIED

INTRODUCTION

Bandai has never contested the findings in Bandai I that it repeatedly copied Midway's PAC-MAN and GALAXIAN video games. Instead, it entered into the broadest imaginable release of Midway to insure that the Bandai I settlement would be final and conclusive. In seeking to vacate Bandai I in this new action, Bandai sets forth a theory that is multiply deficient:

First, as both courts below specifically found, any failure to pursue discovery in the prior action was attributable to Bandai's failure to press that discovery rather than to any "fraud" by Midway.

Second, taking Bandai's "new" evidence at face value, it could not have changed the outcome of Bandai I one iota.

Third, the very nature of the delinquency attributed to Midway (failure to produce two documents) precludes the finding of fraud on the court that is necessary to reopen Bandai I.

Bandai finally contends that even absent fraud the antitrust claims asserted in Bandai II ought not to have been dismissed. Bandai suggests that dismissing these claims prevented it from exploring the possibility that

Midway's supposed discovery delinquencies in the prior action were "part and parcel" of an antitrust conspiracy. This contention is entirely unsupportable. Indeed, Bandai itself conceded in the District Court that without proof of fraud and a setting aside of the prior judgment and release, there could be no antitrust claim against Midway. Petition Appendix at 6. Thus, Bandai's efforts to allege a Sherman Act claim based on unsupported accusations of "fraud" were properly rejected by both lower courts.

I.

THE COURT OF APPEALS CORRECTLY AFFIRMED THAT FOR THREE SEPARATE REASONS BANDAI COULD NOT ESTABLISH FRAUD IN THE PROCUREMENT OF THE PRIOR JUDGMENT

Far from presenting novel or important questions for review, Bandai reargues its "evidence," ignores settled law, and fails to show any conflict whatsoever with controlling authority. Midway's alleged conduct simply does not meet the established standards for fraud on the court. Bandai's Petition should be denied.

Bandai bore a heavy burden in this action for fraud on the court.[2] If actions "could be reopened at the option of an infringer, . . . infringers would have an incentive to enter a consent decree and attempt to relitigate issues . . . . Such relitigation would frustrate the general public interest in

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[2] As found by the District Court, Bandai waited for more than a year before filing this action, and so "has not chosen to pursue relief under [Fed.R.Civ.P. 60(b)(3)] but rather has employed . . . an independent action for fraud upon the court." Petition Appendix at 23-24.

finality of litigation . . . ." *Interdynamics, Inc. v. Firma Wolf*, 653 F.2d 93, 98 (3d Cir.), *cert. denied*, 454 U.S. 1092 (1981).[3]

Even apart from this strong judicial reluctance to reopen litigation at the instance of an admitted infringer, Bandai has not realistically addressed the elements of its claim for fraud on the court. The two lower courts properly held that Midway was entitled to summary judgment for each of the following separate reasons:

First, as both lower courts specifically found as a matter of fact (Petition Appendix at 10, 41), Bandai's supposed failure to discover the "secret agreement" was due to its own "fault or negligence." *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 665, 668 (5th Cir.), *cert. denied*, 454 U.S. 1098 (1981). This finding is supported by the fact that Bandai actually took the depositions of five Namco officers and employees in Bandai I. Petition Appendix at 21 n.1. *Indeed, at Bandai's deposition of Namco's president and*

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[3] *See also Read v. Baker*, 438 F.Supp. 737, 741 (D. Del. 1977), *aff'd mem.*, 577 F.2d 728 (3d Cir.), *cert. denied*, 439 U.S. 869 (1978) (denying relief); *Vecchione v. Wohlgemuth*, 426 F.Supp. 1297, 1317 (E.D. Pa.), *aff'd*, 558 F.2d 150, 159 (3d Cir.), *cert. denied*, 434 U.S. 943 (1977) (same). *Accord, Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 36 (2d Cir. 1982) (reversing dismissal of copyright infringement claims despite possibly illegal license).

Technical arguments such as Bandai's argument that Midway lacked standing have been uniformly rejected as "gamesmanship," where "an alleged infringer, after employing the judicial system for months of discovery, negotiation and sparring, abandons its challenge to validity, executes a license in settlement, and then repudiates the license and seeks to start the fight all over again." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1373 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976) (summarily enforcing settlement agreement and dismissing challenge to validity of patent).

chairman of the board, Midway's counsel actually invited Bandai to ask "whether there are any agreements pertaining to Midway's rights," yet Bandai declined to pose the invited question. Petition Appendix at 19. Bandai did not ask this invited question even though it suspected that "there is also in force between NAMCO and MIDWAY a right of reversion of the copyright in issue to NAMCO." *Id.* at 18. Instead, Bandai chose to settle and forego further discovery despite the fact recognized in the Bandai I settlement agreement that otherwise Bandai might "hereafter discover facts in addition to or different from those which they now know or believe to be true." *Id.* at 4-5. Since both courts below have found, based on undisputed facts, that Bandai's failure to pursue discovery was due to its own acts and omissions, there is no factual basis for any of the legal issues Bandai seeks to raise here. This case therefore presents no issue worthy of review by this Court, which does not ordinarily sit "to review concurrent findings of fact by two courts below." *Berenyi v. INS*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Second, a party (such as Bandai) alleging fraud on the court must prove, *inter alia*, that except for the supposed fraud it would have had a good defense in the prior litigation. *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 667-68 (5th Cir.), *cert. denied*, 454 U.S. 1098 (1981). Otherwise, reopening the litigation would be a burdensome, dilatory, and empty formality. Here both lower courts correctly found that the supposed "secret agreement" was of no conceivable legal consequence to Midway's clearly established standing to sue. Petition Appendix at 8, 39. The supposed "secret agreement" at most limited the duration of Midway's copyright

ownership.[4] As the owner of the subject copyrights, even for a temporary period, Midway plainly had standing to bring Bandai I. 17 U.S.C. § 501(b). As the Third Circuit put it, "Bandai's legal position is simply wrong." Petition Appendix at 8.[5]

Third, "fraud on the court" traditionally exists only where "the court or a member is corrupted or where the judge has not performed his judicial function;" thus, it "is *not* fraud between the parties or fraudulent documents, false statements, or perjury." *Bulloch v. United States*, 763 F.2d

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[4] Namco's transfer was valid "whether or not it is limited in time." 17 U.S.C. § 101. *See also National Comics Pubs., Inc. v. Fawcett Pubs., Inc.*, 191 F.2d 594, 599 (2d Cir. 1951) (licensee had standing to sue despite license provision for copyright to revert to author).

Bandai relies on *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24 (1923). But *Crown Die & Tool* held only that a patent assignment *solely for the purpose of litigation* did not create standing to sue under patent law. A *copyright* infringement claim is assignable, unlike a patent claim. *E.g., Prather v. Neva Paperbacks, Inc.*, 410 F.2d 698, 700 (5th Cir. 1969) ("an assignee of the causes of action for infringement damages, past, present and future, has the right to maintain the action . . . for infringement"); 3 *Nimmer on Copyright* § 12.02, at pp. 12-26 - 12-27 (1985).

More importantly, *Crown Die & Tool* has no application to Midway, which received — and vigorously exploited — the exclusive right to *use* the subject copyrights in the Western Hemisphere. *See* Petition Appendix at 9.

[5] Bandai's own "evidence" similarly shows that Midway owned the subject copyrights, in that Namco supposedly asked Midway to "return" them. Petition at 6. One cannot "return" something one does not own; "property cannot 'revert' from one person to another unless the person from whom it reverts holds title to it." *National Comics Pubs., Inc. v. Fawcett Pubs., Inc.*, 191 F.2d 594, 599 (2nd Cir. 1951) (per Learned Hand, J.). *See also Boesch v. Graff*, 133 U.S. 697, 700-01 (1890) (assignment of patent subject to reassignment on condition subsequent is valid).

1115, 1121 (10th Cir. 1985), *cert. denied*, 54 U.S.L.W. 3484 (January 21, 1986) (emphasis added). Taking Bandai's assertions as true, at worst Midway failed to produce two documents. Such "allegations of nondisclosure in pretrial discovery will not support an action for fraud on the court." *Id.*[6]

Bandai relies heavily on *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238 (1944), a patent case involving pervasive forgery and bribery. *Hazel-Atlas* is far different from Bandai I, in which two immaterial documents allegedly were not produced — and in which the Bandai I trial court was aware of Bandai's profuse allegations of various types of fraud, including claims of fraud on the copyright office. 546 F.Supp. at 143.[7]

Bandai repeatedly contends that it is entitled to a negative inference that there was a vast conspiracy to perpetrate

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[6] *Great Coastal Express, Inc. v. Teamsters*, 675 F.2d 1349, 1357 (4th Cir. 1982), *cert. denied*, 459 U.S. 1128 (1983) ("courts confronting the issue have consistently held that [even] perjury or fabricated evidence are not grounds for relief as 'fraud on the court.' "); *H.K. Porter, Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1118 (6th Cir. 1976) (perjury and suppressed evidence not sufficient to reopen finding of patent infringement); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973) (no relief granted where documents supposedly fraudulently withheld by attorneys).

[7] *See Chas. Pfizer & Co. v. Davis-Edwards Pharmacal Corp.*, 385 F.2d 533, 537 (2d Cir. 1967) (distinguishing *Hazel-Atlas* and refusing to reopen prior judgment of patent infringement where judge had heard allegations of fraud on the patent commissioner).

Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978), and *Stridiron v. Stridiron*, 698 F.2d 204 (3d Cir. 1983), also cited by Bandai, are totally irrelevant since they involved motions under Fed.R.Civ.P. 60(b)(3) brought within one year of the judgment, and so do not address the issues before this Court.

fraud. But summary judgment shall be granted if "there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Bandai bore the burden of presenting genuine factual issues, not mere allegations, and its interpretation of the evidence had to be "reasonable." *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1155 (D.C. Cir. 1984).[8]

In short, as both lower courts found, "Bandai chose to settle the first action even [though] in settling it surrendered the right to pursue additional discovery . . . ." Petition Appendix at 10, 41. It should not be allowed to relitigate irrelevancies that it failed to explore in a long-concluded case just by interposing a bald and unsubstantiated cry of "fraud."

II.

BANDAI'S SHERMAN ACT CLAIM ON ITS OWN CONCESSION WAS DISPOSED OF WHEN THE LOWER COURTS FOUND THAT THERE WAS NO "FRAUD"

Bandai finally urges that its Sherman Act claim should not have been dismissed because dismissal prevented Bandai from exploring whether Midway's alleged "fraud" was part and parcel of an antitrust violation.

As Bandai conceded in the District Court, its present arguments place the cart before the horse because an antitrust violation cannot be established in these circumst-

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[8] *Accord, Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 452 (3d Cir. 1961) (an "unexplained and unsupported allegation . . . does not suffice to prevent granting of summary judgment."). *See also Griffin v. Griffin* 327 U.S. 220, 236 (1946) ("suspicions" of fraud held insufficient to warrant overturning prior judgment).

ances without first showing fraud. Petition Appendix at 6. Bandai was not "precluded" from pursuing its antitrust claims, but was only required to prove first what Bandai itself agreed was a necessary element, Midway's alleged fraud on the court.

Moreover, Bandai's speculation that the Bandai I judgment and settlement may have been "part and parcel" of an antitrust conspiracy is absurd on its face: "We are not able to imagine any meaningful way in which the obtaining of a release could be, in appellants' own words, 'part of and in furtherance of the continuing conspiracy among the defendants' about which plaintiffs complain." *Taxin v. Food Fair Stores, Inc.*, 287 F.2d 448, 451 (3d Cir. 1961) (affirming summary judgment).[9]

CONCLUSION

Bandai is finally reduced to arguing that the summary judgment entered below is inappropriate to resolve antitrust claims, citing *Poller v. CBS*, 368 U.S. 464, 473 (1962). Petition at 10. But characterizing Bandai II as an antitrust action is rather questionable given the motley assortment of marginal claims asserted. Moreover, "the Supreme Court, as well as the lower federal courts, have made clear that summary judgment may be entered in antitrust cases . . . ."

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[9] This principle is especially germane here in that, unlike Bandai's cited case of *United States v. Singer Mfg. Co.*, 374 U.S. 174 (1963), the Bandai I settlement agreement did not "exclude" Bandai from any market. To the contrary, it affirmatively allowed Bandai to compete with Midway under a license. Petition Appendix at 4. Bandai I merely prevented Bandai from persisting in its illegal copying of Midway's copyrights and trademarks.

10A Wright, Miller & Kane, *Federal Practice and Procedure*, Civil § 2732.1 at p. 324 (1983).[10]

Bandai's repeated and progressively more brazen assertions of fraud cannot overcome the multiplicity of fatal

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[10] *Accord, Mid-South Grizzlies v. NFL*,550 F.Supp.558,564 & n.16 (E.D. Pa. 1982), *aff'd*,720 F.2d 772 (3d Cir. 1983), *cert. denied*, 104 S.Ct. 2657 (1984) (emphasis added) (reviewing cases). Indeed, "the failure to grant a summary judgment when otherwise appropriate would be an 'absurd waste of time.' " 10A Wright, Miller & Kane, *Federal Practice and Procedure*, Civil § 2732.1, at p. 333 (1983).

In light of the District Court's appraisal of Bandai's claims as "nonsensical," Petition Appendix at 21 n.l, summary judgment on Bandai's purported antitrust claims likewise avoided an "absurd waste of time."

deficiencies in its lawsuit. Certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923). The Petition should be denied.

Respectfully submitted,

DAVID A. GERBER*
ROBERT A. MEYER
JAMES B. HICKS
LOEB AND LOEB
One Wilshire Building, Suite 1600
Wilshire Boulevard at Grand Avenue
Los Angeles, California 90017

KEITH F. BODE
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

FREDERICK L. WHITMER
GREGORY C. PARLIMAN
PITNEY, HARDIN, KIPP & SZUCH
163 Madison Avenue
Morristown, New Jersey 07960

Counsel for Respondent
BALLY MIDWAY MFG. CO.

***Counsel of Record**